Appeal of:	:	
GARDINER, KAMYA & ASSOCIATES, P.C.,	:	HUDBCA No. 00-C-104-C5
Appellant	:	
Contract No. DU100C000018170	:	

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DECISION

By Administrative Judge H. Chuck Kullberg

June 17, 2005

Statement of the Case

Gardiner, Kamya & Associates, P.C. ("GKA" or "Appellant") submitted a claim for an equitable adjustment in the amount of $540,734.95 plus interest under

Contract No. DU100C000018170 and filed a timely appeal of the contracting officer's denial of its claim to the United States Department of Housing and Urban Development Board of Contract Appeals ("Board"). The Board's decision dated November 27, 2002 denied the appeal. Gardiner, Kamya & Associates, P.C., HUDBCA No. 00-C-104-C5 (November 27, 2002). Appellant appealed the Board's decision to the United States Court of Appeals for the Federal Circuit ("CAFC"), which reversed the decision and remanded it to the Board for further proceedings. Gardiner, Kamya & Associates, P.C. v. Jackson, 369 F.3d 1318 (Fed. Cir. 2004). The CAFC reversed the Board's finding that modification 2 to Task Order 13 ("T.O. 13") and modification 2 to Task Order 14 ("T.O. 14") lacked the consideration necessary to retroactively change the previously negotiated unit prices for the entire performance period of those task orders. The United States Department of Housing and Urban Development ("HUD" or "Government") argued before the CAFC that the "terms of both modifications [were] patently ambiguous because they at once refer to future and past performance." Id. at 1323. The CAFC ruled that because neither had the parties briefed the ambiguity issue nor had this Board made factual findings or conclusions of law on this specific issue, "the prudent course [was] to remand so the board can address these matters in the first instance." Id.

The Board directed GKA and HUD under Board Rule 32 to submit separate reports as to what additional procedures were required to comply with the CAFC's remand order. The Board considered the recommendations in those reports, and directed GKA and HUD to submit supplemental briefs. Familiarity with the findings of fact and discussion of law in our previous decision is assumed.

Findings of Fact

The Contract and Task Orders 13 and 14

1. On May 14, 1993, GKA was awarded contract number DU100C000018170 ("the contract"). (Appeal File ("AF"), Tab 2.1, p. 3) The contract, which was awarded under the Small Business Administration 8(a) Program, was an indefinite delivery, indefinite quantity contract that required HUD to order a minimum of $2,000,000.00 in services and a maximum of $28,000,000.00 in services. (AF, Tab 2.1, pp. 5, 43-44) The contract called for services that included reviews of claims, follow-up reviews, and other technical support to "ensure the integrity of the Single Family Mortgage Insurance Program and to protect the insurance fund …." (AF, Tab 2.1, pp. 8-9) Post claims reviews under the contract required that GKA determine whether "mortgagees have complied with HUD's regulations for submitting accurate claim applications for insurance benefits, and to detect overpayments." (AF, Tab 2.1, p. 13) Follow-up work on post claims reviews required that the contractor prepare "reports, letters,

guidelines and make recommendations to close out findings resulting from post claims reviews." (AF, Tab 2.1, p. 15)

2. Under the contract, HUD ordered claims reviews and follow-up reviews by written task orders, and the contract provided that "[t]ask orders shall be issued on a negotiated basis." (AF, Tab 2.1, p. 29) Upon receipt of the Government's statement of work or specifications for a task order, the contractor was required to submit a technical proposal and a cost proposal. (AF, Tab 2.1, pp. 29-30) The contract provided that the "[p]ayment schedule shall be identified and negotiated under each individual task order." (AF, Tab 2.1, p. 41)

3. The contracting officer requested by letter dated July 28, 1995 that GKA provide proposals for T.O. 13 and T.O. 14. (Exh., G-1) GKA executed both T.O. 13, reviews of claims, and T.O. 14, follow-up reviews, on March 27, 1996, and HUD executed the task orders on March 29, 1996. (AF, Tabs 2.7 and 2.9) Both task orders incorporated in full text HUD Acquisition Regulation contract clause 2452.232-70, Payment Schedule and Invoice Submission (Fixed Price), which provided that HUD would pay GKA on a "monthly basis compensation for the work performed and accepted." (AF, Tabs 2.7, p. 3, 2.9, p. 3) The effective date of both task orders was March 11, 1996 and the period of performance was 15 months from that effective date to June 11, 1997. (AF, Tabs 2.7, 2.9, 3.5)

Modification 2 to Task Order 13 and Modification 2 to Task Order 14

4. In her May 29, 1997 letter, Deborah Courtright ("Courtright"), HUD's Acting Director of the Operations Resource Division, advised GKA "we have decided to extend Task Orders 13 and 14 by six months." (AF, Tab 3.8) The letter further advised GKA that she had submitted a request to the Office of Procurement and Contracts to modify the task orders. Id. On June 12, 1997, HUD's Office of Financial Services requested an extension to the task orders. (AF, Tab 4.10, p. 1)

5. On June 30, 1997, the contracting officer, Diane Wright ("Wright"), advised GKA's counsel, Terry Banks ("Banks"), that GKA would receive oral authorization to begin work under an extension to T.O. 13 and T.O. 14. (G-20) Banks confirmed that discussion in his letter to Wright dated July 1, 1997. Id.

6. In order to negotiate extensions to T.O. 13 and T.O. 14, the contracting officer requested proposals from GKA for both task orders. (Tr. 773-774) In response to the contracting officer's request, GKA submitted on July 21, 1997 its proposals for those task orders on a Government-printed Standard Form ("S.F.") 1411. (AF, Tab 4.7, p. 4, Exh., G-22, p. 10) GKA inserted the words "Option Year Three" on its proposals for both task orders in block 4 of the S.F. 1411, which was labeled "Type of Contract Action." Id. The contract, however,

did not have option years. (AF, Tab 2.1, Tr. 772-773) GKA proposed higher unit prices than those negotiated and agreed to when GKA and HUD executed the task orders in March of 1996. (G-40) The contract specialist, Melvin Gunn ("Gunn"), determined that GKA's proposed unit price increases for both task orders were unreasonable. (AF, Tab 4.8, Exh. G-22.) HUD and GKA were not able to agree to the unit prices for the task orders during the extension period and negotiations were at an impasse. (Tr. 777-778)

7. As a result of the impasse in negotiations with GKA, HUD personnel including Denise Bauman, Gunn, Annette Hancock ("Hancock"), and Courtright met on July 24, 1997 and determined that the Defense Contract Audit Agency ("DCAA") should "audit … [GKA's] processing effort needed to complete the claim reviews required under these task orders." (AF, Tab 4.10, p. 3) GKA agreed to HUD's proposed alternative and to "continue performance at the current task order rates pending the review by DCAA and subsequent negotiations …." Id. On September 16, 1997 Gunn submitted to DCAA a request for an audit. (AF, Tab 4.9) Gunn's memorandum dated October 14, 1997 summarized negotiations for modification 2 to T.O. 13 and modification 2 to T.O. 14, and recommended that a "modification be issued for the contractor to continue working on the initial task order quantities for both task orders …." (AF, Tab 4.10, p. 4) Gunn's October 14, 1997 memorandum did not state that either HUD or GKA had expressed an intention that the adjustment of unit prices that might result from a future audit and negotiations under the terms of the proposed modifications to the task orders would be retroactive to March 11, 1996, the effective dates of both task orders.

8. On October 31, 1997, Chris Gardiner ("Gardiner"), the president of GKA, sent a letter to the contracting officer, Hancock, who had replaced Wright, which expressed his understanding of the terms for GKA's continued performance of T.O. 13 and T.O. 14, and which stated the following:

> This letter is to confirm the instructions GKA received from Melvin Gunn regarding the billing structure and work agenda for the aforementioned task orders.
>
> GKA will go forward with all work outlined in the Statement of Work for the task orders as usual. All invoices are to be billed under the established old rates.
>
> Mr. Gunn further informed us that DCAA will be conducting a review of GKA's time sheets and hourly commitment to the projects in the near future. Adjustments will be made to the old rates at the

> conclusion of this review, if necessary. GKA will then be compensated for the difference between the new and old rates, if necessary.
>
> Please confirm this understanding in writing at your earliest convenience.

(AF, Tab 3.9) We do not find that Gardiner's October 31, 1997 letter expressed to the contracting officer clearly and unambiguously the intent that continued performance of the task orders was conditioned upon a modification to the task orders that would make adjustments to the unit prices retroactive for the entire performance period of the task orders. (Tr. 285-295)

9. Gardiner executed modification 2 to T.O. 13 and modification 2 to T.O. 14 on November 24, 1997, and the contracting officer, Hancock, executed both modifications on November 26, 1997. (AF Tabs 2.8, p. 2, 2.10, p. 2) The relevant portions of both modifications have the same language and will be referred to collectively as "modification 2."

10. Gunn, the contract specialist, drafted both pages of modification 2. (Tr. 656-657) The first page of modification 2 was a Government-printed Standard Form 30, and Gunn inserted "07/01/97" in the block labeled "EFFECTIVE DATE." (AF Tabs 2.8, p. 2, 2.10, p. 2) (capitalization in original)

11. On the first page of modification 2 in the block labeled "DESCRIPTION OF AMENDMENT/MODIFICATION" was the following statement: "The purpose of this modification is to: (1) definitize contracting officer's verbal authorization of July 1, 1997, to continue the services under the existing statement of work; and, (2) extend the performance period of this agreement by additional six (6) months." (AF Tabs 2.8, p. 2, 2.10, p. 2) (capitalization in original)

12. The first two numbered paragraphs on the second page of Modification 2 stated the following:

> 1. The period of performance is hereby modified to read:
>
> "Twenty one (21) months from the effective date of award"
>
> 2. The contractor shall continue performance of the services required under this task order at the same "Unit Price Per Review" specified for the respective categories on Page 3 of the task order. Such prices

> shall remain in effect pending results of the audit and subsequent negotiations of the unit prices.

(A.F., Tabs 2.8, p. 3, 2.10, p. 3)

13. GKA and HUD executed additional bilateral modifications to both T.O. 13 and T.O. 14, which further extended the performance period for T.O. 13 to September 30, 1998 and the performance period for T.O. 14 to December 31, 1998. (AF, Tabs 2.8, pp. 4-9, 2.10, pp. 4-8)

14. DCAA issued its audit of GKA's costs under T.O. 13 and T.O. 14 on December 31, 1997. (AF, tab 4.11) The audit found that GKA's costs for reviews and follow-up reviews under the task orders were higher than the negotiated unit prices that had been in effect since March 11, 1996. (G-40) GKA's attorney and Hancock discussed on May 27, 1998 adjustments to the unit prices for T.O. 13 and T.O. 14, but the discussion did not result in any agreement. (AF, Tab 3.19) GKA's letter dated July 15, 1998 to Hancock proposed higher unit prices for T.O. 13 and T.O. 14, which would apply to the entire period of the task orders and not just the extension period. (AF, Tab 3.20) In response, Hancock's August 4, 1998 letter rejected GKA's proposal and only allowed adjustment of the unit prices for the task orders for work performed from July 1, 1997 through September 30, 1998 for T.O. 13 and from July 1, 1997 to December 31, 1998 for T.O. 14. (AF, Tab 3.22) It was only during those negotiations after the execution of modification 2 that Hancock learned for the first time that Gardiner believed that modification 2 required retroactive adjustments of the unit prices to the beginning of both task orders and not just the beginning of the extension period. (Tr. 803-804)

15. GKA filed its claim by letter dated August 2, 1999 for $540,734.95 for reviews under T.O. 13 and follow-up reviews under T.O. 14 that GKA conducted between March 1996 and June 1997 for "the difference between the March 1996 interim rates and the negotiated rates following the DCAA audit." (AF, Tab 3.26. p. 15) The contracting officer denied the entire claim. (A.F., Tab 1.1)

Discussion

Question Presented

The question before this Board on remand is whether modification 2 is ambiguous and, if so, whether such ambiguity is patent or latent. GKA contends that modification 2 is not patently ambiguous because modification 2 "contemplated a retroactive price adjustment to commencement of the performance of the Task Orders." (Supplemental Appellant Brief ("Supp. App. Br."), at 18) If modification 2 is determined by the Board to be ambiguous,

Appellant urges the Board to find that such an ambiguity is latent and that the doctrine of *contra proferentem* would require that the Board construe any ambiguity against the drafter of the ambiguous language, which is HUD. Id. at 13, 21. In contrast, HUD argues that modification 2 "provided only for prospective repricing (*i.e.*, for the period after the effective date of Modification 2)." (Supplemental Government Brief ("Supp. Gov. Br."), at 9)(emphasis in original). In the alternative, HUD argues that if modification 2 is ambiguous, "that ambiguity was patently obvious, imposing upon GKA a duty to inquire." Id. at 15.

Analysis

We address initially the question of whether modification 2 is patently ambiguous. It is well established that "[c]ontract interpretation begins with the language of the written agreement." NVT Technologies, Inc. v. United States, 370 F.3d 1153, 1159 (Fed. Cir. 2004). "Where contract provisions are clear and unambiguous, they must be given their plain and ordinary meaning." Alaska Lumber & Pulp Company, Inc. v. Madigan, 2 F.3d 389, 392 (Fed. Cir. 1993). A document is not ambiguous because each party has a different interpretation, but "[r]ather, both interpretations must fall within a 'zone of reasonableness.'" Metric Constructors, Inc. v. NASA, 169 F.3d 747, 751 (Fed. Cir. 1999). When the "court interprets the contract and detects an ambiguity, it next determines whether that ambiguity is patent." Id.

On appeal before the CAFC, the Government argued that modification 2 was patently ambiguous. This Board recognizes that an ambiguity is patent when the document reveals "a major discrepancy, obvious omission, or drastic conflict." Walber Construction Company, HUDBCA No. 79-385-C17, 81-1 BCA ¶ 14,953 at 74,017. Under such circumstances " a contractor cannot recover for the effect of a patent ambiguity unless clarification is first sought." Id. HUD argued before the CAFC that modification 2 is patently ambiguous because it referred "at once … to future and past performance." Gardiner, Kamya & Associates, P.C. v. Jackson, at 1323. HUD now argues that modification 2 is patently ambiguous because "the omission of any reference to retroactive pricing would (or should) have been glaringly obvious to GKA." (Supp. Gov. Br., at 16) HUD does not support its argument with any evidence that Gardiner, the person who executed the modifications, expected to see the words "retroactive pricing" or their equivalent in the text of modification 2. We reject that argument by HUD because its acceptance would require us to interpret the text of modification 2 while speculating as to the intent of the parties executing it. While we address the issue of the intent of the parties below, we do not find in the language of modification 2 a major discrepancy, obvious omission, or drastic conflict that would have imposed on GKA a duty to inquire, and we do not find modification 2 to be patently ambiguous.

We find that modification 2 is subject to two reasonable interpretations and, therefore, latently ambiguous. The second page of modification 2 contains two numbered paragraphs that could be reasonably interpreted two ways. Paragraph 1 enlarges the performance period of modification 2 from fifteen to twenty-one months, and that language could be reasonably interpreted as extending the adjustments to GKA's unit prices to that entire twenty-one month performance period of the task orders. (F.F. no. 12) The first sentence of paragraph 2, however, refers to GKA's continued performance at the previously negotiated unit prices, and the next sentence describes the process for negotiating adjustments to GKA's unit prices at a future date after an audit. Id. The first sentence in paragraph 2, which stated that GKA was to continue performance of the task order, in the context of the second sentence, which described the means by which unit prices would be negotiated at a future date, could be reasonably interpreted, in contrast to the first interpretation, as limiting such adjustments of unit prices to only the extension period of the task orders.

HUD argues that modification 2 can only be reasonably interpreted as providing for adjusting unit prices after the effective date of modification 2, July 1, 1997. (Supp. Gov. Br., at 9) HUD's interpretation is reasonable, but it is not the only reasonable interpretation. The effective date of a modification is not insignificant and can determine the rights of the parties. See M. Ten Bosh, Inc., ASBCA No. 15573, 74-2 BCA ¶ 10,744 (effective date of modification established a new beginning date for the performance period of a contract). The effective date of a modification, however, can be subject to more than one reasonable interpretation, which was the finding of the Armed Services Board of Contract Appeals ("ASBCA") in H.Z. and Company, Ltd., ASBCA No. 29572, 85-2 BCA ¶ 17,979. In H.Z. and Company, Ltd., the ASBCA found that the effective date of a modification that retroactively changed the currency exchange rate under the contract could be reasonably "read to mean that its terms were only to be effective as of the effective date …." Id. at 90,182. In the alternative, the ASBCA held that the effective date could "also reasonably be read to mean that as of … [the effective date] the parties agreed to modify their agreement retroactively to the beginning of the contract." Id.

We find that the effective date of modification 2 in this case is subject to more than one reasonable interpretation. The effective date of July 1, 1997 of modification 2 could be reasonably interpreted to mean the date the rights of the parties became effective under the modification, so that any adjustments to unit prices would be effective only after that date. However, the effective date of July 1, 1997 could also be reasonably interpreted to mean only the date that GKA received verbal authorization to proceed with work during the extension periods of the task orders, which was July 1, 1997. Modification 2, therefore, is subject to

more than one reasonable interpretation, so we must determine whether the doctrine of *contra proferentem* applies.

GKA urges the Board to apply the doctrine of *contra proferentem* and construe any latent ambiguity in the language of modification 2 against HUD as the drafter of the modifications and rule in favor of GKA's interpretation. (Supp. App. Br. at 13) The doctrine of *contra proferentem* requires that when a contract document is latently ambiguous, we construe the ambiguity "against the drafter … when the nondrafter's interpretation is reasonable." Hills Materials Company v. Rice, 982 F.2d 514, 516 (Fed. Cir. 1992). The CAFC held, however, in HPI/GSA-3C, LLC v. Perry, 364 F.3d 1327 (Fed. Cir. 2004) that before applying the doctrine of *contra proferentem*, the following four-part test must be met by finding:

> (1) that the contract specifications were drawn by the Government; (2) that language was used therein which is susceptible of more than one interpretation; (3) that the intention of the parties does not otherwise appear; and (4) that the contractor *actually and reasonably construed the specifications* in accordance with one of the meanings of which the language was susceptible.

Id. at 1334 (emphasis in original) (quoting W. Contracting Corp. v. United States, 144 Ct.Cl. 318, 326 (1958)). All of the above four parts of the test must be met in order for *contra proferentem* to apply. Id. at 1335.

Although the four-part test in the HPI decision dealt with a solicitation, that four-part test for the application of the doctrine of *contra proferentem* is also relevant to a negotiated bilateral modification as is the case in this appeal by substituting the word "modification" for "specification" in the above quoted test. When we apply that four-part test to modification 2, we find that the first two parts of the test are met. HUD's contract specialist drafted modification 2. (F.F. no. 10) We find, as discussed above, that the language of modification 2 is subject to more than one reasonable interpretation. However, we do not find that the third and fourth parts of the test are met and, consequently, *contra proferentem* is not applicable.

The third part of the test in the HPI decision is not met in that the intent of the parties does appear elsewhere in the documentary record other than just the text of modification 2. *Contra proferentem*, therefore, is not applicable where "the parties' intention is otherwise affirmatively revealed." Tulelake Irrigation District v. United States, 342 F.2d 447, 453 (Ct.Cl. 1965). Two documents show the parties' intent before they executed modification 2, which are Gunn's October 14, 1997 memorandum and Gardiner's October 31, 1997 letter. (F.F. nos. 7, 8)

Gunn's October 14, 1997 summary of negotiations for modification 2 shows no intention on the part of HUD that the adjustment of unit prices for the task orders would be retroactive to the award of T.O. 13 and T.O. 14, which was effective on March 11, 1996. (F.F. no. 7) We find that Gardiner's October 31, 1997 letter, which stated his understanding of the negotiations, is ambiguous as to whether he intended that such adjustments to GKA's unit prices would apply to only the extension period or to the entire performance period of the task orders. (F.F. no. 8)

The fourth part of the test in the HPI decision is not met because we find that GKA's October 31, 1997 letter precludes the Board from finding that GKA "actually and reasonably" construed modification 2 as adjusting unit prices for T.O. 13 and T.O. 14 retroactively to March 11, 1996, the effective date of the task orders. Gardiner testified that his October 31, 1997 letter was "talking about the whole period of the task order … not … about some extension." (Tr. 262) We find, however, that Gardiner's letter is ambiguous and unclear in expressing the intent asserted in his testimony. Consequently, there is no documentary evidence that Gardiner actually and reasonably interpreted modification 2 as retroactively adjusting the unit prices for the full performance periods of the task orders. (F.F. no. 8) Gardiner's letter explicitly states that GKA would "go forward" with the work and invoice "under the established old rates." Id. The next paragraph of his letter states his understanding that "DCAA will be conducting a review of GKA's time sheets and hourly commitment to the projects in the near future." Id. Gardiner's testimony did not explain where in the text of his October 31, 1997 letter the Board should find the exact intent and meaning of his letter, and we find that the documentary record fails to support the finding that the interpretation now advanced by GKA was the same interpretation that Gardiner held when modification 2 was executed. (F.F. no. 8)

GKA argues in its supplemental brief that Gardiner's October 31, 1997 letter along with Banks' letter dated May 20, 1997 (AF, Tab 3.7) and its July 21, 1997 proposal for T.O. 13 (AF, Tab 4.7) show GKA's understanding that "the language of the Modifications contemplated an adjustment over the Retroactivity Period." (Supp. App. Br., at 22) Both the May 20, 1997 letter from Banks, GKA's counsel, and GKA's July 21, 1997 proposal are dated before the negotiation of modification 2 and do not clarify the lack of clear intent shown in Gardiner's October 31, 1997 letter. In our earlier decision, we rejected GKA's claim that it had an oral or implied-in-fact agreement with HUD to adjust the unit prices for T.O. 13 and T.O. 14 back to the award date of those task orders and we found that Banks' May 20, 1997 letter was the result of the confusion GKA created at the May 6, 1997 meeting at which HUD personnel "believed Appellant was telling them that it was not being paid in accordance with the signed task orders, when in fact it was." Gardiner, Kamya & Associates, P.C., at 14. GKA's

July 21, 1997 proposal for performing T.O. 13 during the extension period (AF, Tab 4.7) cryptically referred to "Option Year Three," but the contract did not have option years. (F.F. no. 6) GKA's July 21, 1997 proposal for T.O. 14 (G-22) made the same reference to a third option year. (F.F. no. 6) We do not find that either Banks' May 20, 1997 letter or GKA's July 21, 1997 proposals give any clearer meaning to Gardiner's October 31, 1997 letter.

Although Gardiner testified that he intended that modification 2 would retroactively adjust unit prices for the full performance period of T.O. 13 and T.O. 14, his testimony cannot overcome the lack of clarity on his part in the documentary record. (F.F. no. 8) The ASBCA in Eslin Company, ASBCA No. 34029, 87-2 BCA ¶ 19,854 held that the meaning of a negotiated modification must be determined from the intentions of the parties, but "the intention that is relevant is the intention manifested objectively by each, rather than any different undisclosed or subjective intention." Id. at 100,454 (citing, RESTATEMENT (SECOND) OF CONTRACTS § 200, comment b). It is well recognized that the "unexpressed, subjective unilateral intent of one party is insufficient to bind the other contracting party, especially when the latter reasonably believes otherwise." Firestone Tire & Rubber Company v. United States, 444 F.2d 547, 551 (Ct.Cl. 1971). We find that any intent on the part of GKA that modification 2 required adjusting the unit prices for T.O. 13 and T.O. 14 back to March 11, 1996 was never manifested clearly and objectively in the documentary evidence before the Board. (F.F. no. 8) Even if Gardiner held such an interpretation, he did not make it clear to HUD until after he executed modification 2. (F.F. no. 14) Gardiner's October 31, 1997 letter did not put HUD on notice that his understanding of the terms for extended performance was different from those expressed in Gunn's October 14, 1997 memorandum. HUD's contracting officer, Hancock, did not realize that Gardiner sought to adjust unit prices for the entire performance period of the task orders until after modification 2 was executed. (F.F. no. 14)

Consequently, we reject, GKA's position that we should apply the doctrine of *contra proferentem* and construe any latent ambiguity against HUD. We find that the third and fourth parts of the test that the CAFC set forth in the HPI decision have not been met, and, as such, the doctrine of *contra proferentem* does not apply in this case, given the standards provided by the CAFC. In a case where it is found that *contra proferentem* is not applicable and there are two different reasonable interpretations of the contract document, the standard for interpretation is the one "most reasonable, in light of the language of the contract and the circumstances of its creation." Randlestown Plaza Associates v. United States, 13 Cl.Ct. 703, 709 (1987) (quoting Tulelake Irrigation District v. United States, at 453).

We find that HUD has offered the most reasonable interpretation of modification 2 under the circumstances. Modification 2 has an effective date of July 1, 1997, and HUD argues that any adjustment to unit prices would be effective from that date and no earlier. Although we find that the effective date of July 1, 1997 is subject to more than one reasonable interpretation, we find it most reasonable to conclude that July 1, 1997 is the date from which adjustments to unit prices would be effective. We find less reasonable the alternative interpretation that July 1, 1997 merely referenced and repeated the date of the contracting officer's verbal authorization to GKA. (F.F. no. 12) GKA's interpretation, moreover, would require that the Board infer from modification 2 an earlier date from which to retroactively change unit prices.

The terms of modification 2 for adjusting unit prices did not say that GKA's unit prices could only be adjusted upward and not downward, and we find that the most reasonable interpretation of modification 2 is the one advanced by HUD because it ties such adjustments, whether upward or downward, to the effective date, July 1, 1997. Modification 2 only said that the unit prices would be negotiated as a result of a future audit. (F.F. no. 12) GKA and HUD executed modification 2 at the end of November of 1997, but the DCAA audit was not completed until December 31, 1997. (FF. nos. 9, 14). The parties, consequently, had no knowledge at the time they executed modification 2 as to whether the audit would result in negotiating an increase or decrease of GKA's unit prices. Our finding is consistent with the decision of the CAFC in Peters v. United States, 694 F.2d 687 (Fed. Cir. 1982). In Peters, the CAFC held that a bilateral modification to a timber sales contract required retroactive adjustment of contract prices to the beginning of the contract performance period in spite of the fact that doing so resulted in a loss to the contractor because the modification specifically stated that it was effective as of the award date of the contract. Id. at 696-697. In light of the CAFC's decision in Peters, we find that a provision for retroactive adjustment of unit prices, which could work to either the disadvantage of the contractor by reducing its unit prices or to the contractor's advantage by increasing its unit prices, should be resolved according to the effective date specifically set forth in the modification, which is July 1, 1997.

GKA argues that HUD had a duty to avoid any ambiguity. (Supp. App. Br., at 23). GKA cites no authority for imposing on HUD any greater responsibility than that found in the controlling law that we have discussed in this appeal. GKA also asserts that it held its interpretation "innocently and in good faith …." (Supp. App. Br., at 22). We do not dispute GKA's positive motives underlying its interpretation of modification 2, but GKA offers no legal authority for finding in favor of its interpretation of modification 2 for that reason. Upon consideration of the record and applicable law, we do not find that modification 2

required a retroactive adjustment of GKA's unit prices for the entire performance period of the task orders.

For the foregoing reasons, Appellant's appeal is DENIED.

_____
H. Chuck Kullberg
Administrative Judge

Concur:

_____
David T. Anderson
Administrative Judge

_____
Jerome M. Drummond
Administrative Judge